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Opinion following transfer from Supreme court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE ADAIR GUIHER,

Defendant and Appellant.

F071469

(Super. Ct. No. MF011436A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Cory Woodward, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Levy, Acting P.J., Detjen, J. and Peña, J.

This case returns to us from the California Supreme Court for reconsideration in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). We previously believed the reclassification of felony convictions as misdemeanors pursuant to the Safe Neighborhoods and Schools Act of 2014 (Proposition 47) had no impact on prior prison term enhancements under Penal Code section 667.5 (undesignated statutory references are to the Pen. Code). The *Buycks* opinion holds otherwise. (*Buycks*, at pp. 871, 889–890.)

Defendant Clyde Adair Guiher plea bargained for a four-year split sentence in a drug possession case, which included two years of mandatory supervision. After Proposition 47 went into effect, he sought to have the period of mandatory supervision reduced by one year and appealed the trial court's denial of his request. Notwithstanding *Buycks*, defendant acknowledges there is now a question of mootness since the trial court's original sentence has expired. We conclude defendant's claims are moot and therefore order dismissal of the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On October 24, 2014, the Kern County District Attorney filed an amended complaint accusing defendant of two felonies and two misdemeanors based on his possession of methamphetamine. For enhancement purposes, he was alleged to have served five prior prison terms (§ 667.5, subd. (b)). On the same date, defendant negotiated a plea agreement for a specified jail sentence and dismissal of several charges and enhancements. Accordingly, defendant pleaded no contest to possession of a controlled substance for purposes of sale (Health & Saf. Code, § 11378) and admitted serving two prior prison terms for convictions under former section 11377 of the Health and Safety Code (possession of a controlled substance) and section 10851 of the Vehicle Code (vehicle taking/posttheft driving).

On November 4, 2014, the voters enacted Proposition 47, which took effect the following day. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597.) The legislation reduced

to misdemeanors several drug-related and theft-related offenses previously classified as felonies or wobblers (i.e., crimes punishable as either felonies or misdemeanors). (*Ibid*.) Proposition 47 added section 1170.18, under which eligible defendants "may petition to have their sentences recalled and be 'resentenced to a misdemeanor.' (§ 1170.18, subd. (b).) Those who have already completed their felony sentences for Proposition 47 eligible offenses may petition to have their felony convictions be 'designated as misdemeanors.' (§ 1170.18, subd. (f).)" (*Buycks*, *supra*, 5 Cal.5th at p. 876, fn. 4.)

Two weeks later, on November 20, 2014, Guiher was sentenced as per his plea bargain. The trial court imposed a four-year jail term composed of two years for the current felony plus consecutive one-year enhancements for the prison priors. Guiher received a split sentence, which allowed him to serve half of the term under mandatory supervision.[1] He was also awarded 88 days of presentence custody and conduct credits. In December 2014, Guiher's prior drug conviction upon which one of the prison priors had been based was reportedly designated as a misdemeanor by order of the trial court.

Guiher did not appeal his judgment of conviction. On March 24, 2015, he filed a "Motion to Modify Mandatory Supervision" pursuant to section 1203.3. In reliance on Proposition 47, Guiher argued his prior conviction for violating Health and Safety Code former section 11377 should be treated as a misdemeanor for all purposes. Accordingly, he requested his period of mandatory supervision be reduced by one year. The motion was denied on April 17, 2015, which led to this appeal.

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[1] "A split sentence is a hybrid sentence in which a trial court suspends execution of a portion of the term and releases the defendant into the community under the mandatory supervision of the county probation department. Such sentences are imposed pursuant to … section 1170, subdivision (h)(5)(B)(i), a provision originally adopted as part of the '2011 Realignment Legislation addressing public safety.'" (*People v. Camp* (2015) 233 Cal.App.4th 461, 464, fn. 1.) "'Under the Realignment Act, qualified persons convicted of nonserious and nonviolent felonies are sentenced to county jail instead of state prison. [Citation.] Trial courts have discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision.'" (*Id*. at p. 467.)

In his initial briefing, Guiher argued that both of his prior prison term enhancements were subject to reversal in light of Proposition 47. We rejected his claims on three grounds. First, we noted relief under Proposition 47 requires the filing of a petition in the sentencing court (see *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1256–1257), which had not occurred as to the conviction under Vehicle Code section 10851. Next, we concluded Proposition 47 did not apply to that particular code section. Lastly, we rejected Guiher's argument regarding the impact of Proposition 47 on prior prison term enhancements. It turns out we were only partially correct on the second point and wrong on the third.

In *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), the California Supreme Court confirmed Proposition 47 does not apply to the crime of posttheft driving. (*Id*. at pp. 1183–1184.) However, a theft conviction under Vehicle Code section 10851 may be eligible for redesignation and resentencing if the defendant can show the value of the stolen vehicle was $950 or less. (*Page*, at pp. 1184, 1188.) More recently, in *Buycks*, Proposition 47 was held to "negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor." (*Buycks*, *supra*, 5 Cal.5th at p. 890.)

In supplemental briefing, defendant concedes he must first seek relief in the trial court to obtain a redesignation of his prior conviction under Vehicle Code section 10851. However, in light of *Buycks*, he seeks reversal of the trial court's order denying modification of the period of mandatory supervision related to his prison prior for the reclassified drug offense. Defendant candidly acknowledges the issue of mootness since the trial court's original sentence has necessarily expired by now.

The People respond to defendant's supplemental opening brief with an argument regarding the supposed need for a certificate of probable cause, which was never issued in this case. We note the certificate argument was not raised in the initial briefing and exceeds the scope of our supplemental briefing order. The People alternatively contend

that reversal of the subject enhancement would implicate the "full resentencing rule," thus allowing the trial court to restructure defendant's sentence to achieve the same aggregate four-year term it originally imposed. The People do not address the question of mootness. In defendant's supplemental reply, he attempts to refute the People's new arguments and concludes by urging us not to dismiss the appeal as moot.

DISCUSSION

As a general rule, appellate review is limited to actual controversies; a case that involves "'only abstract or academic questions of law cannot be maintained.'" (*People v. DeLong* (2002) 101 Cal.App.4th 482, 486.) """[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed."'" (*Ibid*.) In other words, "[a]n appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479.)

The order transferring this case back to us for reconsideration was filed September 19, 2018. Accounting for defendant's 88 days of presentence credits, the four-year split sentence imposed on November 20, 2014, likely expired before the parties even filed their supplemental briefing. Even without those credits, the sentence would have been served in full by November of last year. Given these circumstances, defendant's appeal is moot. (See *People v. DeLeon* (2017) 3 Cal.5th 640, 645–646, 660 [defendant's completion of jail term for a parole violation mooted appeal concerning parole revocation proceedings].)

Some cases hold the mootness doctrine does not apply if resolution of the appeal might clear the defendant's name and erase the "stigma of criminality." (E.g., *People v. DeLong*, *supra*, 101 Cal.App.4th at p. 484.) Defendant admits the relief he seeks will not exonerate him, but he argues "there would be clarification of the extent of [his] record of

felony recidivism." We are not persuaded, especially since the crime underlying the subject prison prior has already been redesignated as a misdemeanor. A favorable disposition in this appeal would not alter the current felony conviction to which he pleaded guilty nor the fact of his incarceration during the first part of the split sentence.

Defendant further contends "excess time spent on mandatory supervision might be allocated to reduce the length of post-release community supervision." He cites *People v. Steward* (2018) 20 Cal.App.5th 407, which holds that excess credits accrued while serving time in *prison* may reduce a term of postrelease community supervision (PRCS). (*Id*. at pp. 411, 426.) PRCS and mandatory supervision serve different functions: The former is an "alternative supervision system to parole" (*Steward*, at p. 420) and applies to defendants who have been released from prison (§ 3451, subd. (a)), while the latter is imposed upon those sentenced to confinement in a county jail pursuant to section 1170, subdivision (h). Defendant was not subject to PRCS in this case, so his reliance on *Steward* is misplaced.

Finally, defendant cites *People v. Morales* (2016) 63 Cal.4th 399, which notes reviewing courts have discretion to decide moot appeals when the issue presented "is likely to recur, might otherwise evade appellate review, and is of continuing public interest." (*Id*. at p. 409.)

We understand our discretionary authority and do not feel compelled to exercise it under the circumstances of this case. The issues raised in the initial briefing have been decided by our state Supreme Court in *Page* and *Buycks*. Furthermore, dismissal of the appeal has no impact on defendant's ability to petition the trial court for redesignation of his prior felony conviction for violating Vehicle Code section 10851.[2]

DISPOSITION

The appeal is dismissed.

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[2]The current deadline for filing a section 1170.18 petition is November 4, 2022. (*Id*., subd. (j).)